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IMPOSSIBLE FOR ACCUSED ON TRIAL FOR CRIME TO WAIVE CONTINUOUS PRESENCE OF SAME JUDGE AND SAME JURY, IN A FEDERAL COURT.

In Freeman v. United States, 227 Fed. 732, decided by Second Circuit Court of Appeals, there came before the court, a question of first impression, so far as it was informed, namely, "whether one judge can be substituted for another in a criminal trial, either with or without the consent of the accused."

There is very elaborate discussion of the provisions of the federal Constitution guaranteeing the right of trial by jury, and of similar provisions in state constitutions and a review of jury trials as at common law. Special stress is laid upon the importance of the same judge before whom a trial is begun continuing in the cause to its final termination. For example, it is said that the word "jury" means "a tribunal of twelve men presided over by a court and hearing the allegations, evidence and arguments of the parties," and trial by jury of twelve men is that "in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts."

Under Florida Constitution it was said that: "The common law rule is that in a trial for felony, if a juror, the judge or the prisoner become incapacitated by illness or death, after the jury is impaneled and sworn in chief, the proper course to pursue is to declare a mistrial and begin *de novo*." This was said, however, in a case where one juror became ill and was excused and another took his place. A number of cases are cited to this proposition.

But the interesting question treated is whether not only what was a common law jury but what was a common law trial before such a jury. It is contended, that it is not merely desirable, that the same judge who tried a case should pass upon motions for new trial and impose sentence, but during the trial there can be no substitution of one judge for another.

As to the right to waive substitution, either one juror for another, or of the judge for another judge, it is contended that the interest of a government in its citizens and their lives and liberty, as shown in the policy of the common law, makes this a question of public policy and therefore, at least so far as a trial for felony is concerned, it is not the subject of waiver.

In the case before the Circuit Court of Appeals a substituted judge came into the trial after the government had presented the whole of its case and the verdict of guilty was reversed because it was held that: "In a criminal case trial by jury, means trial by a tribunal consisting of at least one judge and twelve jurors, all of whom must remain identical from the beginning to the end. It is not possible for either the government or the accused or for both to consent to a substitution, either of one judge for another judge or for one juror for another juror. The continuous presence of the same judge and jury is equally essential throughout the whole of the trial."

It is to be observed that the ruling does not distinguish between felony and misdemeanor, and this is because the federal Constitution guarantees the right to a jury trial "in all criminal prosecutions."

It occurs to us, also, that the policy which forbids any waiver is a constitutional policy which statute cannot change, and as a judge is essential to instruct the jury upon the law and advise them upon the facts, all statutes which forbid a judge to comment on the facts are unconstitutional. This suggestion is not appropriate, however, under constitutions which make jurors judges of the law and the facts in criminal cases.

If constitutions should be thought to provide for a common law jury, this takes in the judge who presides over it, and his common law duties are as free from invasion or diminution as are those of the jury.

But is it not strange that these questions are so very long in becoming conclusively settled?

NOTES OF IMPORTANT DECISIONS.

CARRIERS OF GOODS—CONSTITUTIONALITY OF STATUTE REGULATING LIABILITY OF CONNECTING CARRIERS IN INTRASTATE SHIPMENT.—In South Carolina, statute provides that in through shipments, each carrier is to be held agent of the others and each be liable at the election of a shipper for any damages or loss to goods, the carrier to have an action against whatsoever carrier whose negligence caused the damages or loss. It was claimed that this statute was in contravention of the due process clause of the 14th Amendment, but the claim was held untenable. Atlantic C. L. R. Co. v. Glenn, 36 Sup. Ct. 154.

The chief justice, in unanimous opinion, holds that this contention was controlled by the ruling in A. C. L. R. Co. v. Riverside Mills, 219 U. S. 186, 31 L. R. A. (N. S.) 7, where it was decided that the Carmack Amendment making the initial carrier liable was, as a regulation of interstate commerce, not inhibited by the Fifth Amendment.

It was said: "It is true that case involved the power of Congress over interstate, while this concerns the power of a state over intrastate commerce, but the reasoning by which the conclusion as to the existence of the power was sustained in that case compels a like conclusion with reference to the power of a state over commerce wholly within its borders."

If the power of regulation vested in Congress by the commerce clause, in such a matter, must take into account due process of law under the Fifth Amendment, the reasoning in the cited case must control, but if it can independently of the Fifth Amendment and in its purely dominant way control contractual right within the scope of regulation, such reasoning would seem to be *obiter*. A state would not have, under its police power, the same power over contractual rights, at least, it does not appear to us it necessarily would have the same power.

The chief justice submits a cautionary statement as follows: "Of course, we confine ourselves to the case before us and, therefore, do not decide what would be the rights of the terminal carrier, if against its will, it had been compelled to accept the cattle from the initial carrier in a damaged condition, or if they had never been delivered to it. These questions are not presented by the record, since it is not contended that the acceptance of the cattle by the Atlantic Coast Line was not voluntary. In fact, it is stated in the argument of the plaintiff in error, that long prior to the shipment in question, the statute had been construed by the (state) court, to permit the connecting carrier, upon accepting a shipment from an initial carrier, to repudiate the original bill of lading and issue a new one."

Considering that the statute deals only with contracts "for through carriage recognized, accepted in, or acted upon by such carrier," it seems well within legislative competency to declare all carriers in such a shipment to be contractual principals, election being given to refuse to enter into such relation. There is suggested here also what in the way of burden of proof is upon a shipper suing a connecting carrier in an intrastate shipment for loss or damage thereto.

CRIMINAL LAW — PRESUMPTION AGAINST ACCUSED FOR FAILURE TO SUBMIT EVIDENCE OTHER THAN HIS OWN TESTIMONY.—In Stout v. United States, 227 Fed. 799, decided by Eighth Circuit Court of Appeals a refused instruction said: "The defendant has seen fit to rest his case upon the evidence which has been introduced in behalf of the Government, including such testimony as may have been elicited upon cross-examination of the Government's witnesses. You are instructed that he had a perfect right to do so and that fact must in no wise prejudice you against him," etc.

HOOK, C. J., speaking for the court said: "The claim of immunity or protection seems broader than the statute. The accused refrained not only from testifying himself, but also from offering any evidence whatever by other witnesses or by records, and he seeks to enlarge the immunity from a presumption against him on one ground to an immunity from prejudice on account of another. We

think that is inadmissible. There should be no hurtful presumption from the failure of an accused personally to testify, but that does not necessarily exclude a prejudice resulting from an entire absence of affirmative evidence in defense, nor inferences from a failure to produce evidence peculiarly within his knowledge or control, not requiring personal disclosures or his presence upon the witness stand."

The caution with which the judge put this—"does not necessarily exclude a prejudice," etc.—indicates how easily a prosecuting officer may fall into error in argument before a jury in such a case as was before the jury. It is readily conceivable, however, that the requested instruction was subject to the criticism made of it.

PRACTICE OF LAW—ELIGIBILITY TO OFFICE AS BASED UPON CONTINUOUSNESS IN PRACTICE.—Following our editorial reference in 82 Cent. L. J. 61, anent the practice of law by corporations through retained attorneys, a case decided by Supreme Court of Iowa approaches the question from a somewhat different angle, to-wit: Endeavor by defendant to show he was a practicing attorney. Barr v. Cardell, 155 N. W. 312.

This defendant was an active practitioner for twenty-four years and then he quit trial work and sold his library with the purpose of moving to another state, but he did not move. "But he was consulted by clients at his office, gave advice, prepared contracts, wills and other instruments, and attended to some probate matters. He appears not to have advertised as attorney nor to have sought for legal business as attorneys do 'without soliciting,' but did advertise that he had money to loan." The court then naively says: "He was 'practicing as an attorney at law' quite as definitely as though he had spent his time in the trial of cases in court; in fact, many of the most learned and successful lawyers are never seen at the trial table. Theirs is commonly known as an office practice." He showed, therefore, that he was thoroughly eligible to the office of county attorney to which he had been elected.

There is something anomalous about this case. One would not seem to be a practicing attorney who has money of his own to lend or, if he had, that he would need to advertise the fact. And if he was so fortunate in this variance from a regular practicing attorney, what in the world, did he wish with the office of county attorney?

COURTS—DECISIONS OF A LOCAL NATURE AND THOSE UNDER PRINCIPLES OF GENERAL LAW.—The dissenting opinion in Columbia Digger Co. v. Sparks, 227 Fed. 789, decided by Ninth Circuit Court of Appeals, where there was an action on a statutory bond says: "I think I have shown that the decision of the majority is not in harmony with the decisions of the Supreme Court of the State; but even if it were, the question here involved is one of general law which must be decided in the same way by this court in every case, whether the question arises in an action on a bond given under the federal statute or under the statute of one of the states."

The majority speaks with chariness in saying: "A federal court ought not to upset the rule thus established by the Supreme Court of a State for the guidance of its own citizens, unless that rule is against the very decided weight of authority," and it cites Detroit v. Osborne, 135 U. S. 492, 498, in its saying that: "There should be in all matters of a local nature, but one law within the state; and that law is not what this court might determine, but what the Supreme Court of the State has determined." This excerpt speaks very much more positively than the majority in the instant case spoke, but there is much uncertainty about what may be a question of local law and what a question of general law.

Generally, if not universally, it ought to be said, that if a right of action is predicated upon the terms of a statutory bond, construction of that bond should be deemed a local matter exclusively, and not unless that construction "is against the very decided weight of authority" ought to control. Indeed, there can be no authority at all unless it is local in character.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION — COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION No. 97.

Employment—Relation to Client.—Inconsistent interest of attorney in public employment.—He should decline to advise when his personal interest conflicts.

In the opinion of the Committee, is it proper professional conduct for a lawyer, who is the attorney for a Board of County Commissioners, to advise it in answer to its inquiry whether in his opinion it has legal power to grant an application for the reduction of an assessment on the personal property of a class

of institutions, where the lawyer is not only the attorney for the Board but is also a large property holder and tax-payer, and a director and stockholder in one of the institutions of the class concerned? In the opinion of the Committee, is it sufficient that in advising the Board he should disclose the fact of his interest, or should he decline to advise on account of such conflicting interests?

ANSWER No. 97.—In the opinion of the Committee, the attorney should decline to advise on account of his conflicting personal interest in the matter involved. His personal interest, and the quasi-judicial character of the municipal body, differentiate this case from those where full disclosure of his professional relation to both parties to a controversy, a lawyer may advise either party as to the law applicable thereto.

QUESTION No. 98.

Collection Agency Fees—Partnership between attorney and layman.—Division of fees with layman disapproved.

A. B., an attorney, is in partnership with C. D., a layman, in the collection business, and, under the partnership agreement, divides the earnings of that business with C. D. He does not divide with C. D. the fees which he may receive upon any act or service performed under his name and by virtue of his office as an attorney. A part of the partnership earnings, however, is derived from commissions charged upon collections made by attorneys to whom claims are sent by the partnership. Is there any impropriety in the above practice?

ANSWER No. 98.—In the opinion of the Committee, it is improper for a lawyer to engage in partnership with a layman and divide fees. (See Q. & A. 47, Ia, Ib, IIa.)

A fee charged for professional services is none the less a reward for professional services because it is called "a commission." Lawyers in other states, who are dividing with a collection agency here the compensation they receive for professional services, are themselves, in the opinion of the Committee, guilty of unprofessional conduct. That the service excludes the bringing of suit or appearance in court does not change the inherent character of the situation. In performing the service the lawyer's professional skill and responsibility are engaged. There is no objection to a lawyer engaging in the collection of an account (See Q. & A. 47, Ib), but when he does so, he does so as a lawyer and is subject to the ethics of his profession.

IN ACTIONS UNDER FEDERAL EMPLOYERS' LIABILITY ACT, HOW SHOULD STATE COURTS INTERPRET THE COMMON LAW?

The Act in and of itself "constitutes the sole and supreme law as to the subjects upon which it touches."[1] It may not be pieced out by "resorting to the local statutes of the state."[2] The common and statutory laws are here on a parity, both being "rules of conduct proceeding from the supreme power of the state."[3] Congress having acted, state laws to the extent that they "cover the same field are superseded, for necessarily that which is not supreme must yield to that which is."[4] When the laws of Congress are to be construed "the rules of the common law furnish the true guide."[5] The Act uses the word "negligence" without defining it. Before the Act it was settled that in dealing with questions of negligence the federal courts would not follow the state court decisions, but would exercise an *independent* judgment as to what constitutes negligence.[6]

The probabilities are that a majority of cases under the Act will be tried in the state courts and so receive the impress of the Federal Supreme Court upon writ of error only. This situation presents the subject-matter of this article as one of some significance. Notwithstanding the suit is one arising out of a federal statute exclusive in its sphere and operation, the power to review being controlled by § 237 of the Judicial Code, the court may not be required to examine further than to ascertain "whether plain error was committed in relation to the principles of general law involved,"[7] but it will review and decide those questions which "in their essence involve the existence of the right of the plaintiff to

(1) So. Ry. Co. v. Jacobs, 116 Va. 189.
(2) Michigan C. R. Co. v. Vreeland, 226 U. S. 54.
(3) Western U. T. Co. v. Commercial Co., 218 U. S. 416.
(4) Mondou v. R. Co., 223 U. S. 1.
(5) Rice v. Ry., 66 U. S. at p. 374.
(6) Gardner v. R. Co., 150 U. S. 349; Baltimore, etc., R. Co. v. Baugh, 149 U. S. 368.
(7) Yazoo, etc., R. Co. v. Wright, 235 U. S. 376; So. Ry. Co. v. Bennett, 223 U. S. 80.

recover * * * and the right of the defendant to be shielded from responsibility," which includes questions of law under the Act touching the imputations of negligence, especially when presented upon the contention that there is no evidence of negligence, unless the asserted right is so wanting in substance as to be frivolous.[8] So in the last analysis and from a practical standpoint, the views of the state courts are to be reckoned with.

Whether the proof shows "facts necessary to establish liability under the federal law" presents a federal question.[9] When there is presented a federal question it is "to be determined under the general common law, and, as such is withdrawn from the field of state law or legislation."[10] It may then be safely asserted that what constitutes negligence under the Act presents a federal question. In as much as the Act does not define negligence, etc., we must look to the common law. But to what common law, that of the United States, or of the states? Grant that generally there is no common law of the United States, may there not be, with respect to interstate transactions which by Congressional action have been withdrawn from the realm of state action and control, a common law of the Federal Union? May the *United States* be not considered as a separate entity distinct from the states comprising the union for this purpose? In commenting on the statement that there is no common law of the United States distinct from the common law of the several states, the Supreme Court, in Kansas v. Colorado,[11] said:

"Properly understood no exception can be taken to declarations of this kind * * *. But it is an entirely different thing to hold that there is no common law in force throughout the United States."

(8) Seaboard, etc., Ry. Co. v. Padgett, 236 U. S. 668.

(9) St. Louis, etc., Ry. Co. v. McWhirter, 229 U. S. 265; Central, etc., Ry. Co. v. White, 238 U. S. 507.

(10) Missouri, etc., R. Co. v. Harriman, 227 U. S. 657.

(11) 206 U. S., at p. 96.

The subject-matter of the suit arises out of and depends upon a federal statute, so that the questions involved arise under the laws of the United States, which are declared to be the supreme law of the land, and which are therefore superior to the laws of the states that compose the Union. Where a federal question is to be passed upon there should be no doubt of the law to be applied: it is the law of the United States in the sphere of its sovereignty: the law of its own government. That the laws of the United States shall be ultimately and finally construed by the courts of any other government is a proposition not seriously to be considered.

"If there are such things as political axioms, the propriety of the judicial power of a government being co-extensive with its legislative may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws decides the question. Thirteen (48) independent courts of final jurisdiction over the same causes, arising under the same laws, is a hydra in government from which nothing but contradiction and confusion can proceed."

So wrote Hamilton in the "Federalist." If it be an accepted principle that every government ought to possess the means of executing and interpretating its own laws by its own authority, it will follow that the "Head and Front" of the Federal Union must have the final and determinative word upon an act of that Union's legislative body, dealing with a subject in a sphere where the Federal Union is supreme. Of what avail will it be to withdraw by Congressional action the relation of an interstate carrier to its interstate employe from the realm of state action and control, yet leave to those states the opportunity and power to finally determine what those rights and duties are, save in those respects where the Act speaks its own interpretation. Give me the right to interpret a law by which I am to be bound, and I care not who makes it.

Under the Carmack Amendment the liability of the initial carrier is limited "to some default in its common law liability." In Adams Ex. Co. v. Croniger,[12] the court says: "To hold that the liability therein declared may be increased or diminished by local regulations or local views of public policy would either make the provisions less than supreme or indicate that Congress has not shown a purpose to take possession of the field. The first would be unthinkable and the latter would be to revert to the uncertainties and diversities of rules which led to the amendment."

Before Congress had shown a "purpose to take possession of the field" and when the right of the federal courts to pass upon questions of negligence depended upon the adventitious circumstance of diversity of citizenship, the national aspect of the subject was recognized. In the Baugh case[13] where the question was whether the Supreme Court should adopt the state court's interpretation of the common law as to who were fellow-servants, or should exercise an independent judgment, the court observed: "The question is essentially one of general law. * * * It is a question in which the nation as a whole is interested. It enters into the commerce of the country. * * * The lines of this very plaintiff in error extend into half a dozen or more states, and its trains are largely employed in interstate commerce. As it passes from state to state, must the rights, obligations and duties subsisting between it and its employes change at every state line?" It may be admitted that prior to the Act, there was no federal law of negligence, and that the federal courts applied the law of negligence as a part of the law of the state where the injury occurred. This statute for the first time created a substantive federal right in the employe, distinct from the right theretofore given him by the law of the state. The system of federal liability created by the Act is exclusive of the laws of the states upon the subject, which means that it is exclusive of the grounds of liability available to the employe under the state law, whether statutory or common, and of the grounds of defense afforded by the law of the state to the carrier. If it cannot be "pieced out" by reference to state statutes, why should it be "pieced out" by the adoption of the common law of the states? There is for this purpose no distinction between the two.[14] If "a substantive right or defense arising under the federal law cannot be lessened or destroyed by a rule of (state) practice"[15] why shall the common law of the state have that effect when a recovery cannot be "had under the common or statute law of the state?"[16] Is it not then necessary as well as proper that there be created a federal law of negligence? It matters little whether it be created through the establishment of a law of negligence distinct and separate from the common law of the states, or whether it be created by yielding to the Federal Supreme Court the authority to exercise its own and independent judgment of what the law of negligence is in so far as it arises out of a matter of national import. In North Carolina as to railroads, assumption of risk as a part of the common law is abolished by statute. To what law did the court look in Horton's case,[17] when it held that such defense was open to the carrier?

In Missouri, when the injury is caused by the negligence of the defendant, such defense is not open to the carrier. This rule has been applied to a case under the Act.[18] This decision nullifies the decision in the Horton case. Yet if the common

(12) 226 U. S. 491.
(13) 149 U. S. 368.
(14) Wes. U. T. Co. v. Commercial Co., 218 U. S. 416.
(15) Norfolk, etc., R. Co. v. Ferrebee, 35 Sup. Ct. Rep. 781.
(16) Wabash, etc., R. Co. v. Hayes, 234 U. S. 86.
(17) 233 U. S. 492.
(18) Fish v. Chicago, etc., R. Co., 172 S. W. 340.

law of Missouri is to furnish the guide, such must be the result.

In the Horton case, the carrier contended that in applying the principles of the assumption of the risk the common law and not the statute law or decisions of the State of North Carolina should be the guide. This contention was sustained, the court saying: "The adoption of the opposite view would, in effect, leave the several state laws and not the Act of Congress to control the subject-matter."

The case of Central Vermont Ry. Co. v. White,[19] came up upon a writ of error to the Supreme Court of Vermont. One of the questions decided was that the rule of the federal courts that the burden of proving contributory negligence was on the defendant was to be followed, although in Vermont it was on the plaintiff. It was pointed out in the opinion that the "federal courts have enforced that principle in states which hold that the burden is on the plaintiff," and that "Congress, in passing the Federal Employers' Liability Act, evidently intended that the federal statute should be construed in the light of these and other decisions of the federal courts." Is it not a reasonable conclusion that the same view will obtain as to those federal cases holding that upon questions of negligence the federal courts exercise an independent judgment?

The Supreme Court of North Carolina, in Gray's case,[20] and in Saunder's case,[21] held that the law of the state controls. The same view obtains in Kentucky.[22] The case is criticised in 78 Central Law Journal 109.

The thirty-fourth section of the original Judiciary Act has no bearing here, it having been early held that decisions of the state were not "laws" within the meaning of this section.[23]

Deference to state decisions will create a conflicting body of precedents and destroy uniformity of decision under the Act, so that the rights of the parties will depend upon the forum in which the injury happened to occur. On the other hand, should it be left to the Federal Supreme Court to exercise an independent judgment as to what the law is, a uniform body of precedents unvaried by the state in which the cause of action originates will in time form the nucleus of a general and uniform body of law, to which the state courts as well as the lower federal courts may gradually conform, thus leaving the value of the cases finally determined by the state and lower federal courts to be tested in the light of the principles enunciated by the Supreme Court. In deciding what the common law may be, the Supreme Court will resort to the same sources of information as are open to the state courts, and the evidence of the law where the state courts must seek it, viz., in the "accumulated expressions of the various judicial tribunals in their efforts to ascertain what is right and just between individuals in respect to private disputes;" the inquiry being what is the rule of the common law, and not what the state decisions say it is. For precedents do not constitute the law: they serve only to illustrate principles.

It is the duty of the Federal Supreme Court, which it may not renounce, to form independent opinions and to render independent judgments upon questions of law and right under the Constitution and laws of the nation.[24] Every interstate employe who has the right to prosecute, and every interstate employer who has the right to defend a suit under the Act, has also the right to the independent opinion of that court upon every determinative question of law which is presented for its consideration. Past doubt, what is negligence, i. e., what will give or withhold the damages allowed by the Act, is a determinative question of law arising under the Act.

The alternative is to place the supreme judicial authority of the sovereignty enact-

(19) 238 U. S. 507.
(20) 167 N. C. 433.
(21) 167 N. C. 375.
(22) Helm v. R. Co., 156 Ky. 240.
(23) Swift v. Tyson, 16 Pet. 1.
(24) Cohen v. Virginia, 6 Wheat. 264.

ing the law which gives the right in the absurd and inferior position of merely ascertaining whether the courts of another sovereignty have correctly applied their own particular and peculiar view of the law.

W. M. HENDREN.

Winston-Salem, N. C.

LANDLORD AND TENANT—INVITEE.

SIKORI v. FELLOWCRAFT CLUB et al.

Supreme Court of Michigan. Dec. 21, 1915.

155 N. W. 495.

A landlord demised a portion of a building to a club under an agreement that the club should have control of a freight elevator, but that the landlord and his other tenants might use the elevator, paying such sum as was equitable in view of the respective use by the club and the landlord. The elevator was operated by a servant of the club and the landlord granted the club additional privileges as his payment of the expenses of operation and repair. Held, that where the elevator was in good condition when delivered, no recovery could be had against the landlord for the death of one killed in entering the elevator to deliver goods to the club, whose servant was in charge of the elevator.

MOORE, J. This case is brought to recover damages for injuries resulting in the death of Adam Sikori because of the alleged negligence of the defendants.

Thomas W. Palmer was the owner of a large building on Washington boulevard in Detroit. The building had a basement, and was six stories high above the basement. The first story has five stores; the second and third floors are used as offices. The building was completed the latter part of 1910. The lease from Mr. Palmer to the Fellowcraft Club is dated October 1, 1910, and it leases the three upper floors of the building—

"together with a first-class electric passenger elevator and a proper power freight elevator, with access to said elevators and the stairways leading to said upper three floors through the main halls in said building for the term of ten years. In this lease it is provided that 'it [the Fellowcraft Club] will also pay the expense of operating and keeping in repair the said passenger elevator and said power freight elevator installed in said building by the party of the first part for the use of said party of the second part, and demised hereby.' It is further mutually understood and agreed by and between the parties hereto that the said party of the first part shall have the right and privilege, for himself and his tenants in said building of which the premises hereby demised from a part, to use the said power freight elevator furnished for the use of said party of the second part and hereby demised, provided always that such use shall not conflict or interfere with the enjoyment of the same by the said party of the second part for its uses and purposes, and provided also that said party of the first part shall pay to said party of the second part for such use of said elevator had by himself and tenants such proportion of the monthly expense of the operation and repair of the same and of insurance against accidents in operation thereof, as shall hereafter be found equitable upon the basis of the relative use of the same made by the said party of the first part and his tenants."

In January, 1911, an agreement was made, whereby Mr. Palmer gave the club the use of a certain portion of the basement as payment of his proportion of the expense of operating the freight elevator, keeping it in repair and insuring it against accident. When the Fellowcraft Club took possession the freight elevator and its appliances were inspected. They were of approved type and in common use and were in good working order.

The Fellowcraft Club is a social club. The freight elevator has been operated exclusively by the employes of the Fellowcraft Club. At times freight was carried on this elevator to the second and third floors of the building for the tenants occupying those floors. On July 29, 1913, this elevator was operated by Ernest Law, an employe of the Fellowcraft Club. At the time of the accident the elevator was being used to take two half kegs of beer from the alley entrance to the Fellowcraft Club. The opening in the east wall of the elevator shaft at the alley level was five feet wide and seven feet high. There was a metallic fire door on the outside of this opening which rolled up like a curtain. In this opening there was a semi-automatic gate. When the elevator is brought to the level of the opening on the alley the operator lifts the gate and a dog holds it from falling. If the elevator is raised or lowered six to twelve inches this dog is released and the gate falls, closing the opening.

On July 29, 1913, the plaintiff's intestate was employed by the Stroh Brewing Company. He was sent out as a helper with Frank Kottlefski, a driver of a one-horse truck used for delivering beer, the vehicle, horse, and beer belonging to the Stroh Brewing Company. The plaintiff produced two men who claimed to have seen the accident. One of them testified:

"When I came out into the alley I saw a beer wagon and a man in the alley. I saw a man directly in front of him, and a man up by the beer wagon. * * * There was a man directly in front of me, about eight to ten feet. Then I noticed another man up by the brewery wagon, who seemed to be covering up the wagon. He finished that, and then went towards the elevator entrance in the Palmer Building. I saw him step his right foot upon the elevator. The elevator started up immediately, and I stopped to see what happened. 'He slipped—it caused me to stop, and he fell face forward with his hands out on the elevator platform. His legs were hanging over the edge of the elevator. The elevator was standing still when I first saw him step on the elevator platform. I didn't then see any gate. I saw the man go up on the elevator in that position. When the elevator started up, and I saw the man in that position, I hesitated to see if he would recover himself, or get up, or get any assistance; but that did not happen, so I saw him going on past the upper opening. I stepped over to the elevator to see what became of him, and I looked up the shaft, and the elevator stopped after it had got above that opening a few inches, and I heard one voice say, 'Let me down! let me down!' that way. They all seemed to be excited, and then I heard another voice, 'Let him down! let him down!' and someone said, 'All right! all right!' Instead of the elevator coming down, it started up again. I heard a crackling sound, as if timber or wood were breaking, then I realized what had happened, and I was heartsick. I stepped back across the alley from the place just on a diagonal across the alley out of the way. When I first noticed the man step on the elevator, I could see just the back of a man and the edge of a beer keg. My range of vision was not so it would permit me to see on the inside of the elevator, but I could see the outer edge of the elevator and the entrance to it."

The second witness for the plaintiff testified:

"As I came up near the Palmer Building the first thing that caught my sight was a wagon, and I saw a man there at an elevator. I stopped and lit my cigar, and naturally coming on down more, as I lit my cigar, it went out and I stopped again to light it, then started on down. By that time I was within at least ten feet of the elevator entrance. Then I saw a man leave from the elevator and go towards the wagon. The wagon seemed to have beer or something in it, and had a cover. Then I heard a man say, 'Go and cover the wagon, John, and come back.' I understood him to say 'John.' That is what I heard him say. By that time I walked on down. I had nothing in particular to do, and I used to walk to work at the Fellowcraft Club, and I stopped to watch them taking it up, and I walks back, and I stopped in front of it just like I am here (indicating) and I saw this man step on the elevator. When he stepped the elevator started up; it was absolutely still until he stepped on it and it started up and caught the man midway of the back. Well, from the position that I was looking at and where I was at, he had one leg doubled up; it seemed that he tried to make it upon there, and then the first stop was it caught him; it seemed to be the middle through the back and stomach, and then I ran up, of course; I was excited to see, so I ran up and I says to this—I run up there, looked at the outfit, and it suspended about a minute, and then the man says, 'Lower me down! lower me down!' He says, 'I am all right now.' Well, then it was there for just about, I reckon, about 30 seconds, or a minute, possibly before the elevator took another start; then the shriek and the breaking, and then I looked up, thought possibly something had happened; then I heard excited voices talking; then the elevator started down. I heard the timber breaking, and I heard the man shriek. The elevator shot down to the basement. * * * When I first saw Adam Sikori enter this elevator, there was a white man sitting on the right-hand side and a colored fellow was standing over on the left, on the side fronting towards Washington boulevard. I have ridden on this elevator many times. The cable that operates the elevator is on the left-hand side and next to the inner portion of the building. Whatever the operative force is, it is on the left-hand side and towards the inner portion of the building. I saw Adam Sikori step on the elevator while it was standing still. The operator was standing with his face toward the boulevard and his back towards the alley. The other person on the elevator was sitting in the same position, facing in the opposite direction away from the alley."

At the time of the trial the operator of the elevator at the time of the accident was dead.

On the part of the defendant Frank Kotlefski testified in part:

"I was working for Stroh's Brewery. I have worked for them going on two years next June. I was working for them at the time of the accident to Mr. Sikori. * * * Mr. Sikori was employed by Stroh's Brewery. He was only extra man. Q. Under whose supervision, whose charge, was Sikori? A. I was boss at that time. Q. When he was with you? A. Yes, sir. * * * I remember the day that Mr. Sikori was injured. On the day in question we were to take some beer from the brewery to the Fellowcraft Club. I was driving what they call a single truck. It was drawn by one horse. I came from Grand River into the alley and up through the alley going north, going toward Clifford street, so when I got up in front of the door I got off the wagon, so did my helper, Mr. Sikori. I drove somewhere between two and three feet off from the building. The back end of my wagon came just about even to the door that went into the building. The horse was north of the door. I got off the truck and rang the bell for the elevator to come down. There was a bell right on the side there, just pressed the button in the wall of the building. There was a gate over this opening. It was down from the hole. It was hanging down, so the elevator man came down with the elevator and stopped and shoved the gate up. After he shoved the gate up nobody had to hold it; it stays right there. After that I took a half barrel of beer off to put it on the elevator, then I took another off and put it on the elevator. Two half barrels I put on. Sikori did not help to handle these half barrels. He was on the other side of the truck, on the east side of the truck. After I put the two half barrels on the elevator, I walked on the elevator, and I told Mr. Sikori—we always called him 'John,' and I says, 'Cover up the beer and watch the horse,' and he says, 'I do so.' And I says to Mr. Sikori, 'On the way coming back I will go right down to the basement, there is some empties and I will bring them up,' and I said 'Be sure and don't go away from the horse.' He said, 'All right; I will do so.' So I turned around and sat down on the half barrel, and I said, 'Let it go.'

"Mr. Wurzer: Just a minute. I move to strike out that last.

"The Court: Yes; what he said to the elevator man hardly would be competent.

"Judge Lockwood: Here is a man who was looking and talking with the only other man there, and he says 'All right, go ahead!' and the man then starts it. I think that is competent to show that."

The court granted the motion to strike out any statement made by the witness as to what he said to the operator on the elevator. Witness (continuing):

"I saw Mr. Sikori after the elevator started. As the elevator started, just as the elevator started, he was on the east side of the truck, right by the hind wheel, covering the beer. After this elevator was started I sat down on a half barrel and turned my face toward the elevator man. The elevator was in motion when I sat down, and the elevator was in motion when I saw Sikori at the hind wheel of the wagon. The next thing I heard or saw, the elevator was going up and I was sitting down, and at once I heard a holler and he said, "Oh gee, stop! stop!' and I looked around, and I said, 'Good God, stop quick!' and just as I hollered the 2x4 or 4x4, that little gate is hung on—there is a little pulley there, and a rope goes there holds the gate up there—that came out, and at the same time the fellow on the elevator, he turned around and he stopped, but while he stopped he was up between the elevator and the beam already. Q. Now, will you show to the jury how Mr. Sikori was with reference to the elevator at that time? You can stand up and show, if you want to. A. He was this way (indicating) on the elevator, laying over like that (indicating.) One leg he had down and the other one he had like this here (indicating), lying over like that (indicating). (The indication made by the witness showed that Sikori was lying upon his face upon the floor of the elevator with the lower part of his body extending out easterly beyond the edge of the elevator.) Q. Did the colored man stop? A. Yes; he stopped right there. At the time the elevator stopped the man Sikori was a few inches from the bottom of the beam, between the elevator and the beam. He was pressed between the elevator and the top of the beam. Q. What happened to the gate as you heard him holler? A. Well, I just heard the gate crackling, and I know that 2x4—I call it a 2x4—that broke out of one end. That 2x4 was a piece to which the rope was attached that holds the gate up. The gate shoved up against it. The cross-piece where the gate hangs broke. Q. Now, what was the next thing done after the elevator stopped? A. Well, I hollered to him to lower down.

"Mr. Wurzer: Just a minute; I make this same objection.

"The Court: Not what you said—what was done.

"Witness (continuing): Well, he lowered down the elevator. He lowered it somewhere around two feet, something like that. I got hold of him (Mr. Sikori) around his shoulders like, you know, and by the leg and I twisted him around and put on the elevator, straightened out on the elevator. From the time the elevator stopped it did not start up again. It did not go up any more after it stopped. After I had straightened this man out on the floor of the elevator he was taken down in the basement."

There was a long cross-examination of these witnesses, but the testimony quoted is the substance of the testimony of all the witnesses who claim to have seen the accident. Each of the defendants asked for a directed verdict. The judge submitted the case to the jury in a long charge. From a verdict and judgment of $6,000 in favor of the plaintiff the case is brought here by writ of error.

The defendant the Palmer Estate claim a verdict should have been directed in its favor for several reasons, among them: (a) The only negligence disclosed by the testimony, if there be any negligence, is that of the operator of the elevator who was hired by and was under the exclusive control of the defendant the Fellowcraft Club. (b) Because the deceased came to the freight elevator upon the invitation of the defendant the Fellowcraft Club, and not on the invitation of the executors. (c) Because at the time the accident happened the freight elevator was in the exclusive control of the defendant, the Fellowcraft Club, and the executors or the tenants of the executors because of its use by the Fellowcraft Club would have no right to use it on their own account. (d) That the executors are not responsible for negligence of a servant or servants of the Fellowcraft Club.

[1] Counsel for the appellee contend that as the elevator might be used to carry freight for all the tenants in the building the landlord was bound to see not only that the elevator was in good repair, but was also obliged to have it operated without negligence, citing Shoninger Co. v. Mann, 219 Ill. 242, 76 N. W. 354, 3 L. R. A. (N. S.) 1097, and Sciolaro v. Asch, 198 N. Y. 77, 91 N. E. 263, 32 L. R. A. (N. S.) 945. A reference to these cases will show them distinguishable from the instant case. In the first of them "defendant retained the control of the halls, entry, and elevator in the building for the common use of its several tenants." The elevator was in charge of a servant of the defendant. The plaintiff was in the employ of tenants who were entitled to the elevator service. In the case of Sciolaro v. Asch, supra, the record shows that plaintiff was in the employ of a firm who occupied the ninth floor of a building under a lease given them by defendant which "with other privileges included steam heat and usage of passenger and freight elevators in common with other tenants in the building." In disposing of the case the court said in part:

"While the lease referred to may not measure or limit the rights of the plaintiff as an employe of the tenant, its covenants relating to the furnishing of elevator service by the appellant tended to establish the duty of the latter in respect of that service. The building was one occupied by a number of tenants, who were to have in common the use of the steam heat and the elevators. As to these things, which were to be furnished by the appellant, he had a general control and a corresponding duty. This control and duty were reciprocal and inseparable. The right to control and manage carried with it the obligation to do so with reasonable care and prudence."

So far as this case is applicable to the case we have before us it does not sustain the contention of the appellee.

In 9 Ruling Case Law, p. 1250, it is said:

"Where the owner of a building leases different floors or rooms to different tenants, but retains the control and management of an elevator in the building he is responsible for injuries to tenants, their employes and such other persons as may lawfully use the elevator. But if the tenant has the sole control and management of an elevator in a leased building, he, not the landlord, must give warning and look out for the safety of the persons whom he invites to use the elevator."

In Peake v. Buell, 90 Wis. 508, 63 N. W. 1053, 48 Am. St. Rep. 946, appears the following:

"The elevator was operated by the defendant's tenants, and not by him. The defendant owed the deceased no duty in respect to the operation of the elevator. To constitute actionable negligence, the defendant must be guilty of some wrongful act or breach of positive duty to the plaintiff. Griswold v. C. & N. W. R. Co., 64 Wis. 652 [26 N. W. 101]; Cole v. McKey, 66 Wis. 510 [29 N. W. 279, 57 Am. Rep. 293]; Dowd v. C., M. & St. P. R. Co., 84 Wis. 116 [54 N. W. 24, 20 L. R. A. 527, 36

Am. St. Rep. 917]; Goff v. C. R. & M. R. Co., 86 Wis. 245 [56 N. W. 465]."

There is a discussion of the doctrine of respondeat superior in Hartley v. Miller, 165 Mich. 115, 130 N. W. 336, 33 L. R. A. (N. S.) 81, that is helpful. See, also, Riley v. Roach, 168 Mich. 294, 134 N. W. 14, 37 L. R. A. (N. S.) 834; Daugherty v. Thomas, 174 Mich. 371, 140 N. W. 615, 45 L. R. A. (N. S.) 699, Ann. Cas. 1915 A, 1163; and Janik v. Ford Motor Co., 180 Mich. 557, 147 N. W. 510, 52 L. R. A. (N. S.) 594.

In the instant case the condition of the elevator was good at the time it was delivered by the landlord to the Fellowcraft Club. From that time the obligation to keep in repair was upon the Fellowcraft Club. The elevator was in its charge. If the deceased had any right upon the elevator it was because he was helping to deliver the beer to the Fellowcraft Club by means of an elevator that was in its control and operated by its employe. Under these circumstances we think it should be said as a matter of law that the Palmer Estate is not liable, and that a verdict should have been directed in its favor.

NOTE.—*Operation of Elevator by One Tenant as Relieving Landlord from Liability for Injury to Third Persons.*—It seems to us that the instant case was decided upon a wrong principle. It held that a contract between the landlord and tenant, whereby the tenant, in consideration of release from rent for a certain portion of the basement, was to operate a freight elevator for its benefit and the benefit of tenants on different floors, including this particular tenant, put the elevator so far as third persons were concerned, in the exclusive possession of the contracting tenant. To us this seems nothing more than an agreement for this tenant to run the elevator as the landlord's servant or agent.

Let us see the facts in the two cases cited in support of the court's ruling absolving the landlord from liability, and here let us premise by saying, that it seems that one upon the elevator as delivering freight for this tenant stands in no different status to the landlord than would any other invitee. He goes to the building on his business with one tenant just as he goes on business with another tenant.

In 9 Ruling Case Law, p. 1250, two cases are cited. Henson v. Beckwith, 20 R. I. 165, 37 Atl. 702, 78 A. S. R. 847, 38 L. R. A. 716; Peake v. Buell, 90 Wis. 508, 60 N. W. 1053, 48 A. S. R. 46. The first case shows a leasing of a building and the elevator to a tenant, this tenant leasing the entire building except a small store. As to this store, it does not appear that the elevator served it at all. The general tenant, however, was in the exclusive possession of the entire interior of the building, including the elevator well and covenanted to keep this interior in good condition and repair. This well was like any other part of the interior. Into this well a stranger upon invitation of a tenant, fell. The court said: "It would be a startling proposition that every owner who has leased property to others is liable for its absolute security, at the time of letting, to every person whom a tenant may invite to the premises, when such owner can neither have knowledge of such entry nor the chance for warning or protection." That case certainly does not closely resemble the instant case. There is no definite surrender of control of the elevator by the landlord, but merely an arrangement whereby he pays for its operation by one who happens to be one of his tenants.

The other case in no way is like the instant case. There was no question as to who was in control of the elevator at all. The owner of the premises was. There were no tenants at the time, for the building was in course of erection. Under the facts of the case it was held there was no liability to the invitee of the owner.

The case of Sciolaro v. Asch, 198 N. Y. 77, 91 N. E. 263, 32 L. R. A. (N. S.) 945, does seem very pertinent, and it is distinctly ruled that a contract of the landlord with one of the tenants "to take charge of and operate the steam and electric plant, including the elevators" did not relieve the landlord from his own duty. This "was a duty which he could not delegate to another so as to relieve himself from the consequences of its non-performance. * * * Quite apart from the provisions of the lease, the plaintiff's presence in the elevator was justified by the implied invitation which the appellant is deemed to have extended to all persons who might have business in this building. As to such persons, the law imposed upon him as owner the duty of seeing that the premises were in reasonably safe condition for access and egress."

It was also said as to such a building with many tenants, that a hotelkeeper with an elevator could not shift the responsibility to an independent contractor.

Authority upon the precise point here involved is very scant, but both in the instant case and in the Sciolaro case, there was practically the same kind of contract and the Sciolaro case takes the position that the tenant was but an independent contractor for the owner and this point seems emphasized in the instant case by the fact that the elevator was doing service for the landlord outside of service to the contracting tenants, and really it might be thought his obligation remained that they should be served. But it was a non-delegable duty. C.

CORRESPONDENCE.

LECTURES OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK.

Editor Central Law Journal:

Lectures will be given Wednesday of each week from February 9 to April 5, 1916, (inclusive), at 8:30 p. m., in the Assembly Room of the Association building, which are open to all lawyers on the following subjects:

February 9, 16.—Preparation of corporate indentures. (a) Corporate mortgages. (b)

Collateral trusts and debentures. (c) Rules and practice of New York Stock Exchange. Francis Lynde Stetson. (2 lectures).

February 23.—The foreclosure of corporate mortgages in the United States courts. James Byrne.

March 1, 8.—Reorganization of Corporations; Bondholders and Stockholders' Protective and Reorganization Committees; Voluntary Recapitalization of Corporations. Paul D. Cravath. (2 lectures).

March 15.—The Sherman Anti-Trust Law. George W. Wickersham.

March 22.—The Federal Trade Commission and the Clayton Act. Gilbert H. Montague.

March 29.—Public Service Commissions. George S. Coleman.

April 5.—Public Service Commissions. William L. Guthrie.

These lectures are intended to give instruction—not to the law student, but to the practicing lawyer—principally useful details which are suggested by the actual experience of lawyers accustomed to deal with the subjects in question. If this plan meets with approval this year, it is hoped that such lectures, in the nature of special post-graduate courses in law, may be given regularly hereafter.

SPECIAL COMMITTEE ON LECTURES.

New York, N. Y.

[In our issue of January 21, 1916, (82, Cent. L. J., 54) we had occasion to refer to a course of lectures on advocacy given under the auspices of the Chicago Society of Advocates. The New York County Lawyers' Association, not to be outdone, inform us that they, too, are giving a course of lectures equally as interesting. We are giving prominence to these two notices to show how bar associations and societies can really make themselves useful to the communities and to lawyers. There are lawyers in every community who have made such thorough investigations into some particular question that papers they might prepare would be exceedingly valuable to courts and lawyers. The Journal would be pleased, as far as it may be able to do so, to publish such papers when upon subjects of more than local importance, and thus give them a much wider influence.—A. H. Robbins (*Managing*) Editor].

BOOKS RECEIVED.

Official Index to State Legislation. A cumulative numerical and subject index and a complete record of all bills introduced in all state legislatures. Compiled and published for the co-operating state libraries and legislative reference departments, under the direction of the Joint Committee on National Legislation Information Service of the National Association of State Libraries American Association of Law Libraries. George S. Godard, State Librarian of Connecticut, chairman. F. O. Poole, librarian, Associatlion of the Bar of the City of New York, secretary. Charles F. D. Belden, state librarian of Massachusetts. Herbert O. Brigham, State Librarian of Rhode Island. John A. Lapp, director, Indian bureau of legislative information. A. J. Small, law and legislative reference department, Iowa State library (Vol. 1), 1915. Sold by subscription; weekly numbers, annual number and supplements, for 1916, will be $100. Law Reporting Company, New York. Review will follow.

HUMOR OF THE LAW.

A correspondent writes that an attorney objecting to plea of coverture, interposed by a married woman, showed his contempt for such a pleading by saying to the court: "This defendant has imposed a plea of curvature to hide behind."

The court said it did not see how it could be gotten around.

Burglar (just acquitted, to his lawyer)—"I will drop in soon and see you."

Lawyer—"Very good; but in the daytime, please."—Boston Transcript.

It does not do to jump at conclusions. A witness was being examined in an important case, and his testimony was conclusive. So the lawyer for the other side undertook to make him an object for ridicule.

"You are a business man, I believe?"

"Yes, sir."

"What is your business?"

"I deal in peanuts."

The lawyer smiled knowingly at the jury.

"A peanut vender, eh? How many pints did you sell last month?"

"I hardly know. A million, perhaps."

"What!"

"I handle about a million bushels a year. I am a wholesale dealer."

The lawyer sat down. He had forgotten that the peanut crop is the source of riches to many Southern farmers, and that the annual trade in the humble "goober" foots up $10,000,000!—St. Louis Globe-Democrat.

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Action**—Extortion. — Parties extorting money by duress held not entitled to complain that express company's delay in transmitting money to them allowed the party from whom it was extorted to garnish it.—American Express Co. v. North Ft. Worth Undertaking Co., Tex. Civ. App., 179 S. W. 908.

2. **Adverse Possession**—Claim of Right. — Defendants, owners of a hotel encroaching on railroad land, whose predecessors in ownership held possession for the prescriptive period, but not under a claim of right of color of title, acquired no title.—Bolln v. Colorado & S. Ry. Co., Wyo., 152 Pac. 486.

3.——Hostile Title.—One in possession of land by permission of the owner, cannot acquire title until there is an unequivocal disavowal of the owner's title and the assertion of a hostile title; notice thereof being brought home to the owner.—Mattes v. Hall, Cal. App., 152 Pac. 436.

4. **Alteration of Instruments**—Effect of.—The alteration of a note by the payee, by raising the amount, destroyed the value of such note in his hands, and extinguished the maker's obligation to pay the consideration therefor.—Sherman v. Connecticut Mut. Life Ins. Co., Mass., 110 N. E. 159.

5. **Animals**—Trespass.—Plaintiff, who opened defendant's door in duplex flat by mistake and was bitten by a dog which sprang out, held not a trespasser limited to right to recover as such.—Harris v. Hoyt, Wis., 154 N. W. 842.

6. **Assignments**—Estoppel.—Where purchasers of land assigned their contracts to plaintiff, the assignment was an affirmance of the agreement, and so precluded suit by plaintiff for rescission of the contracts on the ground of misrepresentations.—Cooper v. Hillsboro Garden Tracts, Ore., 152 Pac. 488

7. **Assignments for Benefit of Creditors**—Distribution.—A claim presented on a second distribution of the assigned estate of an insolvent held to have been conclusively adjudicated on the first distribution.—In re Loucks' Assigned Estate, Pa., 95 Atl. 716.

8. **Attorney and Client**—Compensation.—Attorneys representing certain stockholders in a suit to recover on a contract for the sale of stock, held not entitled to recover compensation as against other stockholders who had been benefited by their services.—O'Doherty & Yonts v. Bickel, Ky., 179 S. W. 848.

9. **Bankruptcy**—Depository. — Under Bankr. Act, §§ 61, 50h, the beneficiaries of the bond of a designated depository of the money of bankrupt estates include all depositing trustees and receivers of bankrupt estates.—Illinois Surety Co. v. United States, U. S. C. C. A., 226 Fed. 665.

10.——Liens.—Where a lien, in aid of which the process of a state court issued and was executed, arose from the nature of the claim and not from the process of the state court, and was not affected by the bankruptcy statute, the bankruptcy court had no right, under Bankr. Act 1898, § 67d, to take the property out of possession of the state court, which had jurisdiction of it before the bankruptcy.—Pietri v. Wells, La., 69 So. 847.

11.——Reclaiming Property.—Where a transaction between a manufacturer, and a retail dealer, adjudged a bankrupt, created a bona fide agency and consignment contract, the manufacturer could reclaim his merchandise from the trustee.—In re National Home & Hotel Supply Co., U. S. D. C., 226 Fed. 840.

12.——Set-off.—Surety for H, Bank, a county depository, operated by a partnership, could not off-set, in suit by the partnership's trustee in bankruptcy on notes, an amount which surety had paid the county treasurer for loss of county funds deposited after a partner's death, whether or not surety knew deceased was a partner; he being chargeable with notice.—In re Hallock, U. S. D. C., 226 Fed. 821.

13. **Banks and Banking**—Constructive Notice.—A bank purchasing notes void at their inception cannot be charged with constructive notice of their illegality because its president was the president of the payee corporation, where such person did not become president until after the notes were executed.—Citizens' State Bank of Newton, Iowa, v. Rowe, S. D., 154 N. W. 816.

14. **Bills and Notes**—Protest.—Where plaintiff bank located in Missouri received a check on a bank in Iowa and presented it through the ordinary channels of business, and protested it when payment was refused, there was no failure of due diligence.—First Nat. Bank of Grant City v. Korn, Mo. App., 179 S. W. 721.

15. **Brokers**—Misrepresentation. — Landowners who employed a broker to procure a purchaser, held not bound by his misrepresentations to defendants, with whom he entered into

an agreement to jointly purchase the land; such misrepresentations not being made within the agency.—Leggett v. Moore, S. D., 154 N. W. 804.

16. **Carriers of Goods**—Limitation of Liability.—Under the Hepburn Act of 1906, amending the Interstate Commerce Act, recovery for injuries to an interstate shipment of live stock is limited to the values specified in the tariff rate, which was reduced on account of the reduction in value.—Southern Ry. Co. v. Bynum, Ala., 69 So. 820.

17.——Limitation of Liability.—Under the Hepburn Act, a common carrier may limit its liability on an interstate shipment even as against its own negligence.—United States Horseshoe Co. v. American Express Co., Pa., 95 Atl. 706.

18.——Rates.—Under an express company's rule respecting graduated and aggregate rates on numerous shipments from one point to the same consignee, held, that the consignee could not select packages which would aggregate, and on others pay the graduated rates.—Barrett v. Gimbel Bros., U. S. C. C. A., 226 Fed. 623.

19.——Through Contract.—The defendant carrier which made through contract for shipment of goods by sea and rail, held to have accepted a Swiss shipment and to be liable for its destruction in a government warehouse in Belgium, where it was held for loading.—Canadian Pac. Ry. Co. v. Wieland, U. S. C. C. A., 226 Fed. 670.

20. **Carriers of Passengers**—Care.—It is the duty of a common carrier to exercise the highest degree of care consistent with its equal duty to its other passengers to afford a passenger who wishes to alight at a station a reasonable opportunity to do so.—Seligson v. Bay State St. Ry. Co., Mass., 110 N. E. 263.

21.——Negligence.—A carrier, which allowed a drunken man, after a fight in the smoking car, to enter the ladies' coach, where he fell and injured plaintiff, held guilty of negligence.—Chicago, T. H. & S. E. Ry. Co. v. Fisher, Ind. App., 110 N. E. 240.

22.——Negligence.—Where the motorman of defendant carrier knew that passengers were upon the left-hand running board, that he was on a curve, and that the other defendant's car of unusual width was approaching, the question of defendant's negligence was for the jury.—Walsh v. Boston Elevated Ry. Co., Mass., 110 N. E. 278.

23.——Negligence.—The fact that defendant's electric car started with a sudden jerk while plaintiff was boarding it does not, in itself, establish negligence.—Tabak v. Milwaukee Electric Ry. & Light Co., Wis., 154 N. W. 694.

24. **Commerce**—Interstate Transaction.—Where a railroad company accepts a car billed from a point without the state and transports it to a point on its line for delivery to the consignee, the shipment constitutes interstate commerce, although the car was billed only to the point of connection with defendant's line.—Trowbridge v. Kansas City & W. B. Ry. Co., Mo. App., 179 S. W. 777.

25.——Interstate Transaction.—A train engaged in transporting any goods shipped from without the state to points within the state, or goods destined to points without the state, whether taken aboard within or without the state, is engaged in interstate commerce.—Lynch's Adm'r v. Central Vermont Ry. Co., Vt., 95 Atl. 683.

26.——Mental Anguish.—Under the state statutes allowing recovery for mental anguish in actions for negligent failure to receive, transmit, or deliver a telegraphic message, no recovery can be had where the message is interstate in character, and therefore subject to federal Interstate Commerce Law.—Western Union Telegraph Co. v. Stewart, Ark., 179 S. W. 813.

27. **Constitutional Law.**—Form of Statute.—An ordinance of a city attempting to except bawdyhouses from the operation of a general statute is void, since the Legislature cannot delegate its power to except a class from the operation of a general statute.—Coman v. Baker, Tex. Civ. App., 179 S. W. 937.

28.——Police Regulation.—A statute which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation or by being enacted under a title declaring a purpose which would be a proper exercise of the police power.—Bemis v. State, Okla. Cr. App., 152 Pac. 456.

29. **Contracts**—Indefiniteness.—Contract by officers of insolvent corporation with other officers to buy outstanding merchandise claims, to furnish money for a composition, or to buy at a sale in bankruptcy, was not too vague to be enforced.—Sulzer v. Moyer, Wis., 154 N. W. 700.

30.——Equity.—Where a court of equity takes jurisdiction over the property of a debtor corporation to wind up, no lien can be acquired, save under special circumstances or provisions of law, except by decree of the court having jurisdiction.—Clinchfield Fuel Co. v. Titus, U. S. C. C. A., 226 Fed. 574.

31.——Insolvency.—The mere fact that a corporation is insolvent is not sufficient ground for the appointment of a receiver therefor, without a showing of some equity in favor of complainants.—Continental Trust Co. v. Brown, Tex. Civ. App., 179 S. W. 939.

32.——Interlocking Directors.—One of three interlocking corporations, which received moneys raised from the sale of the bonds of a second company, held liable to it for such moneys, where it loaned them without authority to the third corporation.—In re Hunter Arms Co., U. S. D. C., 226 Fed. 866.

33.——Married Woman.—Where a married woman, a stockholder in a corporation, transferred her stock to her husband, so that he could act as her agent, and he was president of the company, she is liable for dividends wrongfully paid out of the capital stock.—E. L. Moore & Co. v. Murchison, U. S. C. C. A., 226 Fed. 679.

34.——Officer.—Promise of corporation treasurer that it would pay personal notes of another officer given in aid of corporation business held within his apparent authority.—Howland Bros. & Cave v. Barre Savings Bank & Trust Co., Vt., 95 Atl. 679.

35. **Criminal Law**—Pari Delicto.—The rule that one in pari delicto with defendant cannot recover for acts of the defendant does not apply to criminal actions, and the fact that the prosecuting witness was also a party to the crime will not prevent conviction of the defendant.—Lawson v. State, Ark., 179 S. W. 818.

36. **Damages**—Future Pain.—In action for personal injury, held, that the jury might take into account such future pain of body and mind if any, as in all reasonable probability plaintiff would suffer as a direct result of his injury.—Clark v. Dunham, Mo. App., 179 S. W. 795.

37. **Divorce**—Insurance.—P. S. 3110, forbidding libelee in divorce to remarry within three years, held not to avoid a Missouri marriage so as to prevent her recovery in Vermont as a wife and beneficiary on an insurance certificate on her second husband's life.—Patterson's Adm'r v. Modern Woodmen of America, Vt., 95 Atl. 692.

38. **Ejectment**—Burden of Proof.—To recover in ejectment, or the corresponding statutory real action, plaintiff must show title at the commencement of the suit and up to the time of the trial; and if he voluntarily parts with title pending the action he cannot have judgment.—Roman v. Lentz, Ala., 69 So. 827.

39. **Eminent Domain**—Additional Compensation.—That a city used, for construction of sewers and the laying of gas and water pipes, land appropriated for street purposes, held not

to entitle the owner of the fee to additional compensation.—Carpenter v. City of Lancaster, Pa., 95 Atl. 702.

40.——Unlawful Appropriation.—That a water company furnished a portion of water appropriated to persons outside the territory in which it had a right to furnish water held not to render the appropriation unlawful.—Mier v. Citizens' Water Co., Pa., 95 Atl. 704.

41. **Equity**—Jurisdiction.—Where a court of equity acquired jurisdiction of a suit by a creditor of a corporation to whom corporate stock had been pledged, and it appeared that the corporation was insolvent, the court will retain jurisdiction and proceed to administer complete relief.—Clinchfield Fuel Co. v. Titus, U. S. C. C. A., 226 Fed. 574.

42. **Estoppel**—Approval of Bond.—Where it did not appear that county auditor's conduct in promising to approve an appeal bond in highway proceedings and in thereafter declining to do so was calculated to deceive or had actually misled complainants, the auditor was not estopped from refusing to approve the bond for a defect therein.—State v. Palmer, Ind., 110 N. E. 213.

43.——Husband and Wife.—Where a husband procures credit because his wife's property stands in his name, the wife is estopped to claim title as against those extending such credit.—Chaney v. Gauld Co., Idaho, 152 Pac. 468.

44. **Executors and Administrators**—Contract. —Where grandfather agreed that his grandson who was supporting and nursing him, should be paid from his estate on his death, the grandson was entitled though unable to receive compensation in the form expected.—Biggerstaff v. Riley, Mo. App., 179 S. W. 744.

45. **Explosives**—Negligence.—A member of a city fire department, injured by one of a series of explosions constituting a continuing negligent act on defendant's part, held not negligent in entering upon the premises.—Houston Belt & Terminal Ry. Co. v. Johansen, Tex., 179 S. W. 853.

46. **Fraud**—Knowledge of Falsity.—In an action for fraud in the sale of a stallion, where the complaint alleged that the fraudulent statements were known to the seller to be false, the buyer could recover on proof that such statements were in fact made, without showing the seller's knowledge of their falsity.—Maywood Stock Farm Importing Co. v. Pratt, Ind App., 110 N. E. 243.

47. **Frauds, Statute of**—Evidence.—A contract for the sale of so much of a lot as another person, a minor, did not own, was not void under the statute of frauds (Rev. St. 1878, § 2304), since the public records might be resorted to to ascertain the respective interests.—Chudnow v. Ketter, Wis., 154 N. W. 699.

48.——Original Promise.—Promise by person, desiring services of a prisoner, to pay plaintiff any sums for which he might become liable if he would sign such person's bail bond, held an original promise, not within the statute of frauds.—Gonzales v. Garcia, Tex. Civ. App., 179 S. W. 932.

49. **Garnishment**—Wages.—It is not fraud on the rights of creditors for an employer to pay in advance the wages of his employe after he has been garnished, where he does so only to secure for himself the services of the defendant, which he would otherwise lose.—Bump v. Augustine, Iowa, 154 N. W. 782.

50. **Guardian and Ward**—Surcharging.—A guardian held properly surcharged with the amount of loss due to his making no effort to collect moneys belonging to the ward from the former guardian or his bondsmen.—In re Schenkel's Estate, Pa., 95 Atl. 703.

51. **Highways**—Pleadings.—A declaration in an action for the death of a traveler thrown from his sled held to warrant recovery upon proof of defects in the approaches of a culvert.—Fifield's Adm'x v. Town of Rochester, Vt., 95 Atl. 675.

52. **Homestead**—Executory Contract. — Defendant, who received purchase price for homestead, sold on executory contract without signature of his wife, cannot avoid repayment of purchase price, where property was destroyed before deed was made, though she joined in the deed after the fire.—Waters v. Hanley, Ark., 179 S. W. 817.

53.——Paraphernal Property.—Where a married woman borrows money for her separate use, and gives a mortgage therefor on her paraphernal property, she cannot afterwards, on death of her husband, acquire a homestead right in the property to the prejudice of the mortgagee.—Percy v. Ewing, La., 69 So. 852.

54.——Prior Encumbrance.—Divorced wife of owner of wild land, never cultivated nor occupied as homestead, who by decree in divorce action received portion of land, cannot assert homestead rights against purchaser under foreclosure of prior trust deed, made by husband to secure attorney's fees.—Mounger v. Gandy, Miss., 69 So. 817.

55. **Homicide**—Manslaughter.—Where a husdiscovers his wife in the act of adultery, an act consented to by her, and upon provocation instantly kills her paramour the homicide is only manslaughter, but a killing after time for the blood to cool would not be reduced to manslaughter.—State v. Thomas, Iowa, 154 N. W. 768.

56. **Husband and Wife.**—Alienation of Affections.—If a father, from hostility and ill will to his son's wife, brings about a separation, such wife has a cause of action for damages, though a father is under no liability for honest advice to separate, given his son from parental affection.—Lannigan v. Lannigan, Mass., 110 N. E. 285.

57. **Insurance**—Burden of Proof. — Where there is a condition avoiding a benefit certificate if the beneficiary causes the death of the insured, and the defendant alleges that the beneficiary caused his death, it has the burden of proving its plea, and the presumption of innocence is evidence against the defendant.—Patterson's Adm'r v. Modern Woodmen of America, Vt., 95 Atl. 692.

58.——Delivery of Policy.—Insurance company held not liable to beneficiary on life policy undelivered to insured before his death, where the negotiations provided that there should be no contract until the policy had been delivered to insured in good health.—Yount v. Prudential Life Ins. Co., Mo. App., 179 S. W. 749.

59.——Trust.—An incorporated association, composed of members upon whom assessments were made for the purpose of paying death benefits for deceased members, not conducted for profit, is in the nature of a trust, and a court of equity has jurisdiction to protect the trust fund.—Dill v. Supreme Lodge, Knights of Honor, U. S. D. C., 226 Fed. 807.

60.——Waiver.—Assurances by an insurance adjustor, that if the insured would obtain duplicate bills from the wholesale houses, the claim would be adjusted held to constitute a waiver of the iron-safe clause in the policy.—Travis v. Continental Ins. Co., Mo. App., 179 S. W. 766.

61. **Intoxicating Liquors**—Liquor Dealers' Bond.—Where a bartender pours alcohol on a guest and sets fire to it, there is a violation of the condition of a bond that the licensee will keep a quiet and orderly house.—Lynch v. Brennan, Minn., 154 N. W. 795.

62.——Police Power.—The traffic in intoxicating liquors derives its authority only from statute, and a shipper's right to an express company's performance of its contract to deliver intoxicating liquors C. O. D. is always subject to the police power of the state.—Danciger v. American Express Co., Mo. App., 179 S. W. 797.

63. **Judgment**—Nunc pro tunc order.—After term and the expiration of one year the circuit court may correct mistake in entry of a judgment to conform it to judgment actually pronounced, but cannot modify or amend it to conform to what the court ought, or intended to have, adjudged.—Hottelet v. Von Cotzhausen, Wis., 154 N. W. 701.

64. **Malicious Prosecution**—Probable Cause.—"Probable cause" is such a state of facts and circumstances as would lead a man of ordinary caution and prudence acting conscientiously, impartially, reasonably, and without prejudice upon the facts within his knowledge, to believe that the person accused is guilty.—Galley v. Brennan, N. Y., 110 N. E. 179, 216 N. Y. 118.

65. **Master and Servant**—Assurance of Safety.—Foreman of crew digging a ditch held authorized to bind his employer by assurances as to the safety of the ditch.—City of Chattanooga v. Powell, Tenn., 179 S. W. 808.

66.——Directions.—A master is not excused from liability for injury caused by act of servant within the scope of his duty merely because the act was a deviation from his directions, or without his knowledge, or in excess of his authority.—Ellinghouse v. Ajax Live Stock Co., Mont., 152 Pac. 481.

67.——Duress and Coercion.—To punish an employer or his agent for simply proposing certain terms of employment under circumstances devoid of coercion, duress, or undue influence has no reasonable relation to a declared statutory purpose of repressing coercion, duress or undue influence.—Bemis v. State, Okla. Cr. App., 152 Pac. 456.

68.——Employment.—Where an employe remains in employment after expiration of employment contract and without new agreement, the original contract is presumed to continue.—Morris v. Z. T. Briggs Photographic Supply Co., Mo. App., 179 S. W. 783.

69.——Negligence.—Under the Employers' Liability Act, the employer is liable or not accordingly as the negligent act is one of superintendence, or is one which is the subject of performance by subordinate employes without any element of supervision.—Borckmann v. Terry Const. Co., N. Y., 110 N. E. 172.

70.——Negligence.—For a fireman to recover for injuries caused by the negligence of the engineer and the conductor on the same train, who were his superiors, their negligence must be gross.—Chesapeake & O. Ry. Co. v. Shamblen, Ky., 179 S. W. 837.

71.——Signals.—Engine crew not in possession of facts from which ordinarily prudent man would have foreseen that a car inspector on a "kicked" car might alight and be injured by the engine upon a parallel track held under no duty to ring bell or blow whistle.—International & G. N. R. Co. v. Walters, Tex., 179 S. W. 854.

72.——Workmen's Compensation Act.—There can be no recovery under the Workmen's Compensation Act, where one at work in a car on a side track left it and was killed by an engine on the main track, without evidence that it was any part of his employment to cross such track, or to show why he was there.—In re Savage, Mass., 110 N. E. 283.

73. **Mortgages**—Conditional Deed.—Where a purchaser borrows money and the vendor conveys the land to him as security, the lender becomes a trustee of the legal title for the purchaser, and a mortgagee for the money advanced who may retain the title and enforce his lien by foreclosure.—Power & Irrigation Co. of Clear Lake v. Stephens, U. S. C. C. A., 226 Fed. 642.

74.——Extension.—Mortgage allowing three-year extension for payment of "balance" due held not to condition right of extension upon an anticipatory payment.—Dawson v. Grote, Mass., 110 N. E. 270.

75. **Municipal Corporations**—Abutting Owners.—At common law, where no compensation was allowed the abutting owner for authorized highway improvements, such as a change in grade, municipal authorities could destroy shade trees in the street without compensation.—Goodrich v. Village of Otego, 110 N. E. N. Y. 162, 216 N. Y. 112.

76.——Imputable Negligence.—Owner of automobile, driven by chauffeur negligent in failing to see boy approaching street crossing on roller skates at a negligent rate of speed in time to stop the car to avoid a collision, held liable for the boy's death.—Hopfinger v. Young, Mo. App., 179 S. W. 747.

77. **Navigable Waters**—Easement.—Where a street terminates at the high-water mark of navigable waters, the public has a perpetual right of way over the place where the street and the navigable waters meet, and, if a structure is built out from the street, the easement is extended to the end of the structure.—In re Main St. in City of New York, N. Y., 110 N. E. 176, 216 N. Y. 67.

78. **New Trial**—Bystanders.—Where the regular trial panel is filled from bystanders and a jury called therefrom, without knowledge of the parties until after trial, an objection then made in motion for new trial should be sustained, and new trial granted.—Haight v. Omaha & C. B. St. Ry. Co., Neb., 154 N. W. 836.

79. **Novation**—Assent.—The assent of a laborer or materialman, entitled to the protection of a government contractor's bond, to the contactor's assignment and to the assignee's assumption of obligations, did not amount to a novation.—United States v. Illinois Surety Co., U. S. C. C. A., 226 Fed. 653.

80.——Original Debt.—Where it is agreed that a substituted note shall be an absolute payment of the original debt or note, it will operate as an extinguishment of the original indebtedness by way of novation.—Western Auction & Storage Co. v. Shore, Mo. App., 179 S. W. 769.

81. **Partnership**—Accounting.—On accounting between partners, where the books had been incorrectly kept, so that it was impossible to determine in what proportion partnership and personal funds had been commingled by defendant, it became incumbent upon him to show the amount of credit to which he was entitled.—Navarro v. Lamana, Tex. Civ. App., 179 S. W. 922.

82.——Action.—Plaintiff, suing railroad for damage to live stock, part of which had been owned by a partnership of which he was a member, who showed no transfer by his partner to him of former's interest in the cattle or claim for damages, could not maintain his action for damage to the partnership stock.—Hardesty v. Atchison, T. & S. F. Ry. Co., Mo. App., 179 S. W. 725.

83.——Parties.—Subject to the power of the Legislature to otherwise provide, all members of a partnership must be made parties to authorize a judgment against the partnership and its property.—American Express Co. v. North Ft. Worth Undertaking Co., Tex. Civ. App., 179 S. W. 908.

84. **Payment**—Application of.—Where more is paid at any one time than acquired interest due on a land contract, the surplus should be credited on the principal, so as to reduce the interest-bearing principal.—Cain v. Stewart, Utah, 152 Pac. 465.

85. **Physicians and Surgeons**—Employment.—Railroad company held not liable to doctor employed to attend a person struck by a train for services undertaken after notice that it would not be liable for further services or attention.—Vandalia R. Co. v. Bryan, Indiana, 110 N. E. 218.

86.——Negligence.—In an action for negligent treatment of an injured finger, held, that plaintiff must show that defendant did what physicians and surgeons of ordinary care, skill, and diligence would have done, or omitted to do what they would have done, and that the injury directly resulted therefrom.—Hier v. Stites, Ohio, 110 N. E. 252.

87. **Pledges**—Forgery.—Defendant, in action to recover note and policy containing forged assignment, could not secure a preference out of the payer's estate by appropriating the debt due to it from the plaintiff on such note.—Sherman v. Connecticut Mut. Life Ins. Co., Mass., 110 N. E. 159.

88. **Principal and Agent**—Contracts.—One who barters for an automobile with a reputed sales agent, in the absence of express or implied authority in agent to barter, held to act at his peril.—Holmes v. Tyner, Tex. Civ. App., 179 S. W. 887.

89.——Release.—Subsequent insanity of co-defendant, who had authorized defendant to enter into a contract concerning the assets and management of a corporation, held not to terminate defendant's authority, or to release him from liability for defendant's acts as his agent.—Powell v. Batchelor, Mo. App., 179 S. W. 751.

90. **Principal and Surety**—Contract.—A bond to secure the money due from employe to his employer, not naming any particular place or time of employment, is a general bond, but it must be read in the light of the contract which it is given to secure.—Jewel Tea Co. v. Shepard, Iowa, 154 N. W. 755.

91. **Railroads**—Discovered Peril.—Where a railroad engineer discovers a trespasser on the track in a position of peril, and the distance is too short to stop the train, it is negligence for him to fail to give the alarm signal.—N. O. & T. P. Ry. Co. v. Jones' Adm'r, Ky., 179 S. W. 851.

92. **Rape**—Evidence.—In a prosecution for rape, where the state did not claim that the

defendant had exclusive opportunity, evidence that the prosecutrix was seen away from her home with other men at about the time in question was inadmissable.—State v. Tetrault, N. H., 95 Atl. 669.

93. **Receivers**—Appointment.—Where a mortgage creditor of a business corporation provokes the appointment of a receiver, and other mortgage creditors acquiesce in the appointment, they are estopped to deny that supplies furnished the receiver should be paid for in preference to the debt due them.—Teutonia Bank & Trust Co. v. Security Brewing Co., La., 69 So. 833.

94. **Reformation of Instruments**—Parties.—One who is both executor and trustee of his father's estate has no interest as trustee to sue for the reformation of a deed by which part of decedent's property was conveyed, in order to avoid liability for breach of warranty of title to that part included by mistake.—De Veer v. Pierson, Mass., 110 N. E. 154.

95. **Sales**—Warranty.—A buyer, who claimed that the seller breached a warranty as to the seaworthiness of coal barges, held to have the burden of proving that their unseaworthiness was not discovered before a given date.—Marmet Coal Co. v. People's Coal Co., U. S. C. C. A., 226 Fed. 646.

96. **Specific Performance**—Beneficiary.—The right of a wife, with whom deceased had made an antenuptial agreement to make her beneficiary of death benefit certificate, to a quasi specific performance against the beneficiary actually named in the certificate, could not be enforced after death of the husband, unless the named beneficiary was a volunteer or had knowledge of the agreement.—Ryan v. Boston Letter Carriers' Mut. Ben. Ass'n of Boston, Mass., 110 N. E. 281.

97. **Street Railroads**—Emergency.—In an action for personal injury in collision with a street car, plaintiff's error of judgment prompted by fear of imminent injury did not absolve the motorman, under the humanitarian rule, from exercising reasonable care to avoid injury.—Michaels v. Harvey, Mo. App., 179 S. W. 735.

98.——Indebtedness.—A constituent company in a consolidation agreement, which has paid money for stock in the other company, held liable for the indebtedness of the selling company created in raising funds used for the benefit of the purchaser.—Norton v. Union Traction Co. of Indiana, Ind., 110 N. E. 113.

99.——Look and Listen.—Driver approaching street car tracks held bound to look for cars and stop in place of safety if one was approaching, making it dangerous to cross.—Guffey v. Harvey, Mo. App., 179 S. W. 729.

100.——Receivers.—Where a street railroad is operated by receivers they alone, and not the company itself, are responsible for personal injuries due to the negligence of the company's servants.—Ingino v. Metropolitan St. Ry. Co., Mo. App., 179 S. W. 771.

101. **Taxation**—Inheritance.—Under Inheritance Tax Law, pt. 4, § 1, as amended by St. 1912, § 1, wife, after death of husband, held not taxable as having taken by survivorship one-half of realty owned by her with her husband as tenant by the entirety.—Palmer v. Mansfield, Mass., 110 N. E. 283.

102.——Inheritance.—Those entitled to property upon failure to exercise power of appointment held entitled to elect to take under will creating the power, thereby defeating the inheritance tax, though donee of power gave part of the property to others.—In re Slosson's Estate, N. Y., 110 N. E. 166, 216 N. Y. 79.

103.——Transfer Tax.—Where a husband conveyed property to himself and wife as tenants of the entirety, held, that transfer taxes of his death could be assessed against only one-half of the property.—In re Klatzl's Estate, N. Y., 110 N. E. 181, 216 N. Y. 83.

104. **Trade-Marks and Trade Names**—Adoption.—A property right inhering in a trademark is perfected by its adoption, or adoption and use, and a later appropriator is a trespasser, though the prior claimant had not extended his trade into the territory of the later appropriator.—Theodore Rectanus Co. v. United Drug Co., U. S. C. C. A., 226 Fed. 545.

105.——Imitation.—Word "Wearever," stamped on aluminum ware, though expressive of durability, held also distinctive, and entitled to protection from imitation by other makers of such ware under Comp. St. 1913, § 9490.—Aluminum Cooking Utensil Co. v. National Aluminum Works, U. S. D. C., 226 Fed. 815.

106.——Registration.—Registration of the words "Old Crow" as a trade-mark in connection with whiskey held valid under the act of 1905.—W. A. Gaines & Co. v. Rock Spring Distilling Co., U. S. C. C. A., 226 Fed. 531.

107. **Trusts**—Attorney Fee.—Allowance of attorney's fees out of a trust estate will not be sustained on appeal, where the allowance is made up of several items in the aggregate, and without testimony as to the value of each of them.—In re Clark, Iowa, 154 N. W. 759.

108.——Declaration of Trust.—Under a declaration of trust, held that, on the death of the settlor while his brother and nephew were living, the absolute ownership of corporate stock given in trust vested in the brother.—Wood v. Paul, Pa., 95 Atl. 720.

109.——Equity.—A bank, whose cashier used its funds in paying another institution from which he had borrowed money, and delivered a note made by deefndants as collateral, held to have no equitable lien on the note on the theory of resulting trust; the cashier having no rights therein.—Pensacola State Bank v. Thornby, U. S. C. C. A., 226 Fed. 611.

110. **Vendor and Purchaser**—Constructive Notice.—A recorded deed containing the name of E. forged as grantee held not to give constructive notice of E.'s alleged title to the land.—Nesland v. Eddy, Minn., 154 N. W. 661.

111.——Rescission.—Where an agreement for the sale of land contained no provision as to retention of payments on default, and the vendor, who rescinded, was able to sell the land at the original price, the purchaser, who defaulted, is entitled to recover his payments.—Chamberlain v. Ft. Smith Lumber Co., Mo. App., 179 S. W. 740.

112.——Rescission.—Where plaintiff, after discovering the falsity of representations by which he was induced to purchase land, remained in possession and then leased the premises before beginning suit, his delay precluded rescission.—Cooper v. Hillsboro Garden Tracts, Or., 152 Pac. 488.

113. **Waters and Waters Courses**—Well Defined Channel.—Where water, after heavy rains and melting snow, is regularly discharged through a well-defined channel that the force of the water has made for itself, the channel is an ancient natural water course.—Vandalia R. Co. v. Yeager, Ind. App., 110 N. E. 230.

114. **Wills**—Construction.—Words in a will will not be given an unusual meaning, except where evidenced by the connection in which used and necessary to effectuate the intention of testator as gleaned from whole instrument.—Sims v. Ratcliff, Ind. App., 110 N. E. 122.

115.——Deed.—An instrument in the form of a warranty deed, conveying certain land on condition that it was to go into effect only after the death of the grantors, the survivor to have possession during his or her natural life only, and that the grantee agreed to pay certain money within six months after the survivor's death, held a deed.—Trumbauer v. Rust, S. D., 154 N. W. 801.

116.——Residuary Estate.—Will, providing that if residuary estate should amount to $4,500 "one half of this sum" was given to one charitable institution and the remaining half to others, held to give the whole residuary estate to such institutions.—Miller v. Idaho Industrial Institute, Mass., 110 N. E. 274.

117.——Trust.—Where a will creates a life estate in trust, with remainder over at death of life tenant, the devisees take a vested fee in the remainder, subject to be defeated by their death prior to that of the life tenant.—Johnson v. Whitcomb, Ky., 179 S. W. 821.

118.——Vested Interest.—Where testator bequeathed his residuary estate for life, with remainder over to his five children, the life tenant being granted power of disposition with the consent of the children, the remainder of a child was nevertheless vested.—Caples v. Ward, Texas, 179 S. W. 856.